STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2003
v	No. 241432 Wayne Circuit Court
CHARLES X. BLESSETT, Defendant-Appellant.	LC No. 01-002932-01

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of less than twenty-five grams of heroin and possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); possession of a firearm by a person convicted of a felony, MCL 750.224f, and carrying or possessing a firearm when committing a felony, MCL 750.227b. He was sentenced, as a third habitual offender, MCL 769.11, to two to eight years' imprisonment for his possession of heroine and cocaine convictions and 23 months to ten years' imprisonment for his felon in possession of a firearm conviction, to be served concurrently, but to be served consecutively to his five-year term of imprisonment for his felony-firearm conviction (second offense). Defendant appeals as of right. We affirm.

Defendant first argues that the trial court committed two instructional errors. First, defendant specifically argues that the trial court improperly stated to a prospective juror that there was "no such thing" as jury nullification. Defendant failed to object to the trial court's statement, and this Court's review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130, 136 (1999).

Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence. *People v St Cyr*, 129 Mich App 471, 473-474, 341 NW2d 533 (1983). Jury nullification is a de facto power with regard to which the jury is not instructed, not a right. *People v Bailey*, 451 Mich 657, 671 n 10; 549 NW2d 325 (1996); *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997). In the absence of the Legislature's recognition of jury nullification as a defense, a defendant is not entitled to present a defense that does nothing more than present facts that are aimed solely at prompting jury nullification. *People v Demers*, 195 Mich App 205, 206-208; 489 NW2d 173 (1992). Here, the jurors were instructed to return a verdict based only on the evidence and the court's instructions on the law. The trial court properly did not instruct the jury on jury nullification. Therefore,

defendant has failed to show that this claimed instructional error was plain error affecting substantial rights.

Defendant preserved his claim in regard to the second instructional error by specific objection. This Court reviews claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002) *People v Hubbard* (*After Remand*), 217 Mich App 459, 487, 552 NW2d 493 (1996). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124, 631 NW2d 67 (2001). Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Kurr, supra* citing *Aldrich, supra*.

Defendant's claim arises from the following supplemental instruction:

> You've heard some testimony in regards to physical evidence. And what I'm going to point out to you is the prosecutor always has the burden of proof, that never changes and it never shifts. But both sides are entitled to make efforts to have certain pieces of evidence analyzed or developed.

Defendant specifically argues that, despite the trial court's caution, the above statement improperly shifted the burden of proof to defendant because it suggests that defendant should have produced, analyzed, or developed certain physical evidence. Defendant argues prejudice resulted because, at trial, this instruction defeated his claim that the police did not obtain fingerprints from the plastic bag and gun because he did not possess them.

Here, the instruction did not shift the prosecution's burden of proof to defendant. The instruction did not impose an obligation on defendant nor did it lessen the prosecution's burden of proving every element of the crimes beyond a reasonable doubt. The instruction was directed at defense counsel's argument that the prosecution failed to establish that defendant possessed the drugs and gun because there was no physical evidence to corroborate the police offers' testimony. Though the instruction may have mitigated defense counsel's argument in regard to the prosecution's lack of fingerprint evidence, the instruction also addressed the unfounded inference arising from defense counsel's argument that, had the police taken fingerprints from the baggie or gun, defendant's fingerprints would not be present. Therefore, this instruction helped to clarify the issue of possession for the jury.

Moreover, the numerous instructions given to the jury in regard to the prosecution's burden of proof protected defendant's rights, and reversal is not required. Indeed, the trial court expressly stated that challenged comment did not relieve the prosecution of its burden of proof. In addition, the trial court instructed the jury that the prosecution had the burden of proof on every element of the crimes on several occasions. Considering the instructions in their entirety, the challenged instruction did not compel the jury to believe that the burden of proof was on defendant.

Defendant next argues that he was denied effective assistance of counsel because defense counsel failed to move to suppress evidence resulting from the police's violation of the knock and announce rule. Because defendant failed to move for an evidentiary hearing or motion for new trial before the trial court, this Court will only consider counsel mistakes to the extent that

they are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that (1) "counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment," and (2) "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 599-600, 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668, 687, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Here, defense counsel properly determined not to move to suppress evidence on the basis of the knock and announce rule. Defendant does not challenge the validity of the search warrant. Defendant asserts that the police violated the knock and announce rule, but suppression of evidence is not an available remedy for a violation of that statute. *People v Stevens* (*After Remand*), 460 Mich 626, 644-645; 597 NW2d 53 (1999); see also *People v Vasquez* (*After Remand*), 461 Mich 235, 241; 602 NW2d 376 (1999); *People v Hudson*, 465 Mich. 929, 932; 639 NW2d 255 (2001). Moreover, the following statement from *Stephens* appears readily applicable here:

> the discovery of the evidence in the present case was inevitable, regardless of the alleged illegalities on the police officers' entry into defendant's home. The knock and announce rule is not meant to allow the defendant the time to destroy the evidence. In the present case, the police did not exceed the scope of the search warrant. Therefore, they would have discovered the contested evidence, unless the defendant had been afforded the opportunity to destroy the evidence. The timing of the police officers' entry into the home in no way affected the inevitability of the discovery of the evidence. [*Stephens*, *supra* at 646.]

We cannot conclude differently in this case because the drugs and gun would certainly have been discovered regardless of the timing of the police officers' entry into the house. Because, in this case, a motion to exclude evidence under the knock and announce rule is without merit, ineffective assistance of counsel has not been established. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Moreover, defense counsel exercised trial strategy in regard to the police's adherence to the knock and announce rule. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defense counsel argued that because the police were required to "knock and announce," which took time, it was unbelievable that the police would have then seen defendant attempting to discard the drugs when they entered the house. Indeed, defense counsel stated during closing argument, "[w]hy wait until the police actually come into the room and decide, let me get rid of this evidence." Because defense counsel's decision not to move to suppress evidence based on the knock and announce rule permitted an argument that the police officers' testimony was not credible, defense counsel was not ineffective. Therefore, defendant has not established his claim for ineffective assistance of counsel.

Defendant last argues that the trial court erred in sentencing him above his sentencing guidelines. Because defendant maintains that his minimum sentence is longer or more severe than the appropriate sentence range, he "may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range." MCL 769.34(7).

Defendant specifically challenges his sentences for two to eight years' imprisonment for his possession of heroin and cocaine convictions. At sentencing, the prosecution requested that the trial court sentence defendant as a third habitual offender. When passing sentence, the trial court expressly stated that defendant was being sentenced as a third habitual offender. The judgment of sentence also expresses that defendant was sentenced as a third habitual offender for both his possession of heroin and possession of cocaine convictions. When taking into account defendant's status as a third habitual offender, his guidelines range for each of these convictions is re-calculated at two to twenty-five months' imprisonment.[1] See Sentencing Guidelines Manual, p 98.

MCL 734.10(10), provides in relevant part.

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. . . .

Consequently, because defendant's minimum sentences of two years' imprisonment are each within the appropriate guidelines sentence range of two to twenty-five months' imprisonment, this Court must affirm defendant's sentences.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio

[1] The trial court scored defendant's prior record variable at 40 points.